

New Developments In The Missouri Removal Wars

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In recent verdicts, St. Louis courts are enhancing their reputation as a problematic jurisdiction for defendants. Not surprisingly, removal and remand issues dominate the early stages of many filings. The classic case is the multi-plaintiff case with two or three plaintiffs from Missouri joining with multiple plaintiffs from out of state who allege piggyback jurisdiction on the backs of the three Missouri plaintiffs.

The courts in the Eastern District of Missouri have not been hospitable to removal of such cases. They have often refused to consider a personal jurisdiction attack on out-of-state diversity destroying plaintiffs, concluding they have no subject matter jurisdiction.



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They reason that subject matter jurisdiction is an “easy” question which they will decide first under *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999). See, e.g., *Nickerson v. Janssen Pharmaceuticals, Inc.* No.4:15CV1762, 2016 WL 3030241 (E.D. Mo. 2016); *Morgan v. Janseen Pharmaceuticals, Inc.*, No. 4:14CV1346, 2014 WL 6678959 (E.D. Mo. 2014); *Butler v. Ortho-McNeil-Janssen Pharms., Inc.*, No. 4:14/cv1485, 2014 WL 502583 (E.D. Mo. 2014).

Of course, subject matter jurisdiction actually implicates fraudulent joinder issues, which are more complex than personal jurisdiction. See, e.g., *Torres v. Johnson & Johnson*, No. 2:14-cv-29741, 2015 WL 4888749, at *3 (S.D.W.Va. Aug. 17, 2015) (mesh MDL) (“Therefore, following *Ruhrgas*, I FIND the question of personal jurisdiction here to be straightforward, whereas the issue of subject matter jurisdiction raises difficult and novel questions of federal procedural law. Consequently, I address personal jurisdiction first.”) (emphasis in original); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, No. 14 C 1749, 2016 WL 640520, at *3 (N.D. Ill. Feb. 18, 2016) (electing to address the “more straightforward” personal jurisdiction rather than accept plaintiffs’ “oversimplifie[d]” argument that “subject matter jurisdiction ... can be confined to a simple review of the named parties’ citizenship.”); *In re Zofran (Ondansetron) Prods. Liab. Litig.*, No. 1:15-md-2657, 2016 WL 2349105, at *2 (D. Mass. May 4, 2016) (“In this case, considerations of judicial economy strongly suggest resolving the issue of personal jurisdiction ahead of subject-matter jurisdiction. Resolution of the question of subject-matter jurisdiction necessarily involves an assessment of GSK’s contention that the three non-Missouri plaintiffs were ... fraudulently joined. ...”).

But two recent decisions governed by Missouri law take a different view from the *Nickerson* line of cases on which question is easier. The first is *Addelson v. Sanofi, S.A.*, No. 4:16-CV-01277, 2016 WL 6216124 (E.D. Mo. Oct. 25, 2016). This was a claim where there were only two plaintiffs — one from Missouri and one from New Jersey, whose presence destroyed diversity jurisdiction.

Defendants argued that there was no personal jurisdiction as to the New Jersey plaintiff, and that plaintiff's claim should be dismissed before the court ruled on the pending remand motion. The District Court agreed. It found the personal jurisdiction issue to be more "straightforward," relying on *In re Testosterone Replacement Therapy Prods. Liab. Coordinated Pretrial Proceedings*, 164 F. Supp.3d 1040, 1045-46 (N.D. Ill. 2016).

On the merits, the court concluded that there was no general jurisdiction under *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014). And it found no specific jurisdiction because the New Jersey plaintiff had not alleged any facts which connected her claims with defendants' Missouri contacts.

It specifically rejected piggyback jurisdiction — that the out-of-state plaintiff could establish specific jurisdiction on the theory her claims were related to those of the in-state plaintiff. The most significant part of the opinion appears in Footnote 3 where the court noted prior decisions of the Eastern District of Missouri permitting piggyback jurisdiction to establish specific jurisdiction:

Two decisions from the Eastern District of Missouri have mentioned the issue of personal jurisdiction over out-of-state plaintiffs' claims in addressing motions to remand. See *Gracey v. Janssen Pharm., Inc.*, No. 4:15-CV-407 CEJ, 2015 WL 2066242 at *3 (E.D. Mo. May 4, 2015); *Bradshaw v. Mentor Worldwide, LLC*, 4:15-CV-332 SNLJ, 2015 WL 3545192 at *2 (E.D. Mo. Jun. 4, 2015). The opinion of the Northern District of Illinois, and the opinions of the First, Third, and Fifth Circuit Courts of Appeals are helpful in reaching the court's conclusions, here. Supplemental specific personal jurisdiction does not exist; personal jurisdiction must exist separately for each claim. See *In re Testosterone Replacement Therapy Prods. Liab.*, 164 F. Supp. 3d at 1048; *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 275, n.6 (5th Cir. 2006); *Remick v. Manfredy*, 238 F.3d 248, 255 (3d Cir. 2001); *Phillips Exeter Acad. v. Howard Phillips Fund*, 196 F.3d 284, 289 (1st Cir. 1999).

This is a polite way of saying that piggyback jurisdiction does not exist and that prior Eastern District of Missouri cases on this issue were not properly decided. Addelson did not quote the language from *In Re Testosterone* but it is powerful on the underlying due process issue at stake here:

Under the theory plaintiffs propose, the alleged sale and promotion of AndroGel within Missouri, which allegedly caused a Missouri plaintiff's injury, would subject defendants to general personal jurisdiction in Missouri for claims brought by any plaintiff who allegedly suffered injury by purchasing and using AndroGel anywhere in the country. Such a result would be plainly contrary to "traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316, 66 S.Ct. 154. See, e.g., *Keeley v. Pfizer Inc.*, No. 4:15CV00583 ERW, 2015 WL 3999488, at *3 (E.D.Mo. July 1, 2015). In this case, such a result would be particularly at odds with the rationale underlying the requirement that a defendant have minimum contacts with the forum state. One purpose of that requirement is to "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 564, 62 L.Ed.2d 490 (1980). That purpose would be frustrated in this case if a Missouri court were to have personal jurisdiction over Bernaix's claims. *In Re Testosterone*, 164 F.Supp.3d at 1049.

The second decision is *In Re Bard IVC Filter Products Liability Litigation*, No. CV-1602442, 2016 WL 6393595 (D. Ariz. Oct. 28, 2016). In this case an MDL court, applying Missouri law, rejected a motion to remand in a decision consistent with *Addelson*. In *Bard*, eight unrelated plaintiffs, none from Missouri, sued in the 22nd Judicial District of Missouri. One of the plaintiffs was an Arizona resident, as was one of the defendants.

The case was removed to federal court in Missouri and transferred to the MDL where plaintiffs moved to remand based on lack of diversity. The court found that the personal jurisdiction issue was easier. The *Bard* Court cited *Testosterone* and noted that “[d]efendants’ fraudulent joinder argument raises complicated issues on which there is no controlling Eighth Circuit precedent. ...”

It went on to analyze personal jurisdiction. It first found no general jurisdiction over defendants in Missouri since they were neither incorporated or had their principal place of business there. *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014). It also found no specific jurisdiction since plaintiffs could not show their injuries arose out of defendants’ conduct in Missouri. Indeed, they received their filters and medical care in other states.

Testosterone was the key case relied upon on the *Ruhrgas* choice of jurisdiction issue in both of these cases. And it was also the key decision relied upon on the issue of specific jurisdiction in *Addelson*. These are significant new decisions in the removal wars in Missouri.

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